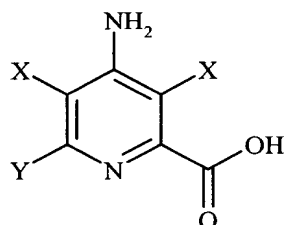


in which X represents H or F; and Y represents a C<sub>1</sub>-C<sub>4</sub> alkyl group optionally substituted with a C<sub>1</sub>-C<sub>4</sub> alkoxy or thioalkoxy substituents or a C<sub>2</sub>-C<sub>3</sub> alkenyl group.

BE 788,756, on the other hand, is directed to the 2-carboxylic acid derivatives and 4-amino derivatives of a compound of the formula



in which X represents halogen and Y represents C<sub>1</sub>-C<sub>4</sub> alkyl. While halogen is generically defined as being chlorine, bromine, fluorine or iodine, BE 788,756 only describes and exemplifies compounds in which both X represents only chlorine or only bromine.

The present invention differs from BE 788,756 in the substituent in the 5-position. In the present invention, X is specifically either hydrogen or fluorine; in BE 788,756, X is specifically disclosed as either chlorine or bromine.

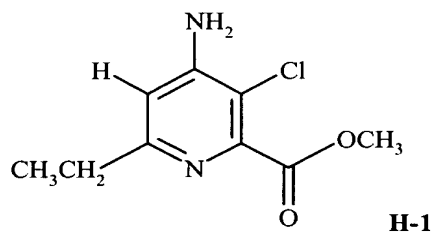
To clearly demonstrate the unobviousness of the present invention over BE 788,756 and the invention taught or suggested therein, the Applicants submit herewith an Affidavit under 37 C.F.R. §1.132 by Mr. Paul Schmitzer.

This Rule 132 Affidavit is based on the test for unobviousness as set forth in *Ex parte Dole*, 119 USPQ 260. Since this test for unobviousness appears to be basic law today, and this decision has not been overruled or overturned, such test was employed.

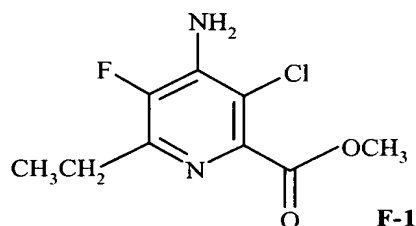
*Ex parte Dole* is directed to the same issue as in the present rejection. In essence, the Board, in this decision, set forth requirements which must be met if patentable distinctions are to be found between analogous compounds. One such requirement is that the activity of the claimed compounds must be "unexpectedly advantageous" over that of the prior art compound. Another requirement is that any affidavit filed must set forth sufficient data (facts) to permit real evaluation, rather than it being based on unsupported statements of conclusion or opinion. The other basic requirement made by the Board is that any advantage or area of advantage which is found or set forth must itself find support in the specification as filed.

The Rule 132 Affidavit of Mr. Schmitzer compares the pre-emergent and post-emergent activity of four compounds of the present invention, viz.,

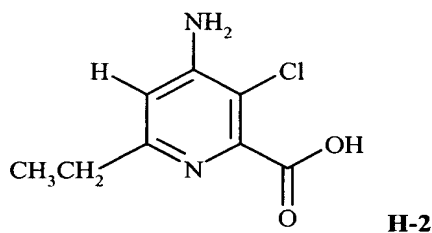
Methyl 4-amino-3-chloro-6-ethylpyridine-2-carboxylate



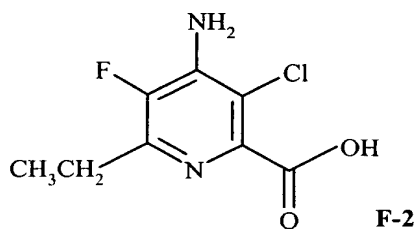
Methyl 4-amino-3-chloro-5-fluoro-6-ethylpyridine-2-carboxylate



4-Amino-3-chloro-6-ethylpyridine-2-carboxylic acid

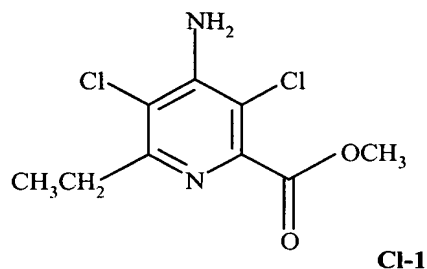


4-Amino-3-chloro-5-fluoro-6-ethylpyridine-2-carboxylic acid

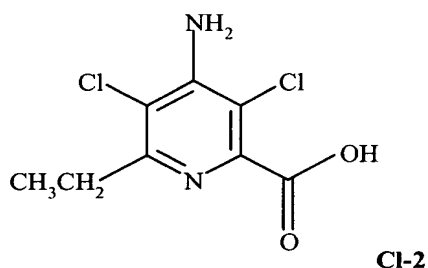


with the closest compounds disclosed or suggested by the prior art

Methyl 4-amino-3,5-dichloro-6-ethylpyridine-2-carboxylate



4-Amino-3,5-dichloro-6-ethylpyridine-2-carboxylic acid



It is understood that any showing (data) set forth to rebut a presumption of obviousness over the prior art reference, must meet the requirements of *Ex parte Dole* and in addition must be sufficient to establish a difference in kind and not indicate a mere difference in degree.

The question which must be answered is whether or not a sufficient showing has been made in the affidavit presented herewith.

As indicated from the Affidavit of Mr. Schmitzer, the presently claimed compounds show "unexpectedly advantageous" herbicidal properties over the compounds of BE 788,756.

A comparison of both the pre-emergent and post-emergent GR<sub>20</sub> values for **H-1** and **H-2** versus **CI-1** and **CI-2** demonstrate that the compounds of the present invention in which X represents hydrogen are more selective (safer) to crops than the compounds of the prior art in which X represents chlorine. For example, when comparing the post-emergent GR<sub>20</sub> values for the ester **H-1** (>500 g/ha for corn; >500 g/ha for rice; >500 g/ha for wheat) versus the ester **CI-1** (245 g/ha for corn; 180 g/ha

for rice; 45 g/ha for wheat), **H-1** is at least about 2.5 times safer to corn, at least about 2.5 times safer to rice and at least about 11 times safer to wheat than **Cl-1**.

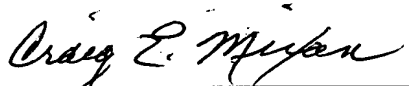
A comparison of both the pre-emergent and post-emergent GR<sub>80</sub> values for **F-1** and **F-2** versus **Cl-1** and **Cl-2** demonstrate that the compounds of the present invention in which X represents fluorine (<31 g/ha for **F-1**; <31 g/ha for **F-2**) are more efficacious against broadleaf weeds than the compounds of the prior art in which X represents chlorine (61 g/ha for **Cl-1**; 70 g/ha for **Cl-2**). Thus the methyl ester **F-1** is at least about 2 times more effective than the methyl ester **Cl-1** and the acid **F-2** is at least about 2 times more active than the acid **Cl-2** against broadleaf weeds.

The compounds chosen for the comparative showing are the closest compounds taught by the prior art. The compounds differ only in their substitution at the 5-position of the pyridine ring.

As indicated by the data presented in the Affidavit of Mr. Schmitzer, the presently claimed compounds demonstrate either enhanced selectivity or enhanced efficacy lacking in the closest compounds disclosed in BE 788,756 and are patentably distinct therefrom.

On the basis of the above remarks, reconsideration of this application and its early allowance are requested.

Respectfully submitted,



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